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No. 06-845

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

M2 SOFTWARE, INC.,

Petitioner,

v.

MADACY ENTERTAINMENT and
M2 COMMUNICATIONS, L.L.C., et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a Circuit Court of Appeals must assign a new panel to consider a motion, filed after the mandate was issued, under 28 U.S.C. § 455 where it is alleged that there was an appearance of bias.

LIST OF PARTIES AND RULE 29.6 LISTING

Respondent M2 Communications, L.L.C.'s ("Respondent") name was changed to INO Records, L.L.C. It is a wholly owned subsidiary of Integrity Media, Inc.

As the question presented does not involve the Ninth Circuit's decision to dismiss defendant Jeff Moseley for lack of jurisdiction, *see M2 Software, Inc. v. M2 Communications, L.L.C.*, 149 Fed.Appx. 612, 615 (9th Cir. September 12, 2005), *reh'g en banc denied* (9th Cir. Nov. 1, 2005), he is not properly listed as a real party in interest. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 579 n.3 (1986).

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BRIEF IN OPPOSITION FOR M2 COMMUNICATIONS, L.L.C.

I. STATEMENT OF THE CASE

This is a trademark infringement action brought by Plaintiff M2 Software, Inc.

M2 Software's Petition follows the Ninth Circuit's denial of its motion to recall the mandate, vacate the opinion, and reassign the underlying appeal in *M2 Software, Inc. v. M2 Communications, L.L.C.*, 463 F.3d 868 (9th Cir. 2006) (*see* Petitioner's Appx. "A") (hereinafter "*M2 Communications*") and denial of Petitioner's request for a rehearing *en banc* of the issue (*see* Petitioner's Appx. "C").

M2 Software's motion is based on the fact that a Ninth Circuit panelist, Judge Pregerson, owned stock in Time Warner during the reporting period covered by January 1, 2003 through December 31, 2004. (Pettinari Decl., Exh. 2 at 8, 11).[1]

M2 Communications, L.L.C. is a distributor of Christian music recordings, some of which were distributed under its "M2.0" label. (SER 0159-61, 0385-86.)[2] M2 Software alleged that M2 Communications infringed M2 Software's "M2" trademark. M2 Software also alleged that

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[1] At the July 20, 2006, market valuation of Time Warner, the amount of stock owned by Judge Pregerson would have been less than 0.000022 percent of the company. (Dec. of David K. Caplan In Supp. of Opp. to Mot. to Recall Mandate, Exh. 3.)

[2] Citations to "ER" are to Petitioner's Excerpts of Record before the Ninth Circuit; Citations to "SER" are to Respondent M2 Communications' Supplemental Excerpts of Record Before the Ninth Circuit.

Word Entertainment infringed M2 Software's trademark through distribution of M2 Communications' products pursuant to a distribution agreement. (ER 65-2/16). Based on this allegation regarding Word Entertainment, M2 Software sued Gaylord Entertainment Company, the parent company of Gaylord Creative Group, Inc., which in turn owned Word Music Group, Inc. Until its sale in January 2002, Word Entertainment was a wholly owned subsidiary of Word Music Group, Inc. Thus, until January 2002, the defendant Gaylord was the great-grandparent company of the alleged infringer Word Entertainment.

In or about November 2001, three months prior to the filing of the complaint in *M2 Communications*, defendant Gaylord announced the sale of Word Entertainment to Warner Music Group. (ER 58-31). That sale closed in January 2002, one month prior to the filing of the action. (ER 58-31; ER 90-2). Gaylord informed M2 Software of this sale in March 2002. (ER 58-44). At the time that M2 Software served Gaylord with the complaint in *M2 Communications*, in June 2002, it was aware that Word Entertainment was owned by Warner Music Group, which at that time, was owned by Time Warner, Inc. Indeed, based on this sale to Warner Music Group, M2 Software claimed that Gaylord committed a fraudulent transfer under Cal. Civ. Code § 3439.01. (ER 4-17.) Notably, M2 Software never sued Warner Music Group or Time Warner. Indeed M2 Software never even sued Word Entertainment, nor its parent, Word Music Group, Inc., nor its parent Gaylord Creative Group, Inc.

On August 1, 2003, the District Court issued its Summary Judgment Order in which it granted summary judgment to M2 Communications. On September 19, 2003,

M2 Software filed its amended notice of appeal of the summary judgment and jurisdiction decisions.

On November 24, 2003, Time Warner announced that it had sold Warner Music Group (the parent of Word Entertainment).[3] (Dec. of David K. Caplan In Supp. of Opp. to Mot. to Recall Mandate, Exh. 1.)

On December 24, 2003, M2 Software filed its Opening Brief. On March 3, 2004, M2 Communications filed its Answering Brief. On April 1, 2004, M2 Software filed its Reply Brief.

On November 10, 2004, a calendar check was performed in the Ninth Circuit to assign the case for oral argument. On November 30, 2004, over nine months after the sale of Warner Music Group by Time Warner, the case was calendared for argument. On February 7, 2005, the case was argued and submitted to Judge Harry Pregerson, Judge William C. Canby, and Judge Robert R. Beezer of the Ninth Circuit. On September 12, 2005, the Ninth Circuit issued its Memorandum affirming the District Court's decisions. On September 26, 2005, M2 Software filed its petition for rehearing and rehearing en banc which was denied by the Ninth Circuit on November 1, 2005. On November 8, 2005, the mandate issued. On January 30, 2006, M2 Software filed a petition for a writ of certiorari in *M2 Communications*. The Supreme Court denied this petition on April 17, 2006. On May 12, 2006, M2 Software filed its petition for rehearing in *M2 Communications*, which was denied by the Supreme Court on June 12, 2006.

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[3] On February 27, 2004, this deal was completed. (Dec. of Mark L. Pettinari in Supp. of Mot. to Recall).

On July 7, 2006, M2 Software filed its motion to recall the mandate which is at issue in its Petition. Petitioner requested that its motion be heard by a new panel. On August 21, 2006, in a published decision the Ninth Circuit denied the motion to recall the mandate and denied the request to have the motion heard by a new panel. 463 F.3d 868. On September 28, 2006, M2 Software filed its petition for rehearing and rehearing en banc which was denied by the Ninth Circuit on October 26, 2006. The Ninth Circuit issued its mandate on November 27, 2006, which was followed by the filing of the Petition by M2 Software.

II. REASONS FOR DENYING THE WRIT

A. Introduction.

Petitioner M2 Software, Inc.'s request should be denied because it is well-established that a Court of Appeals judge may determine whether she or he is biased for the purposes of ruling on a motion made pursuant to 28 U.S.C. § 455. The plain language of the statute confirms this basic fact. Thus, the issue presented by the instant petition does not require consideration by this Court. In addition adequate procedural safeguards exist through the appellate process should an error be made by a judge during self-evaluation. Moreover, a ruling as requested by Petitioner, that a presiding judge does not have the capacity to determine her or his own bias, would wreak havoc on the courts, creating judicial gridlock, as aggrieved parties engaged in "judge shopping" upon the mere allegation of bias.

Because the ruling sought by Petitioner would contradict the plain meaning of the statute and reverse well-established precedent, this Court should deny the Petition.

B. Argument.

The plain meaning of 28 U.S.C. § 455 confirms that a judge may determine her or his bias without referring the matter to another panel. 28 U.S.C. § 455 provides that "any justice, judge, or magistrate judge of the United States *shall disqualify himself* in any proceeding in which his impartiality might reasonably be questioned." (emphasis added). A prerequisite to self-disqualification is self-evaluation. Thus, the plain meaning of the statute supports denial of the Petition.

Case law supports this plain reading of the statute. In the case relied upon by Petitioner, *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861 (1988), the Judge had self-determined the claim of alleged bias. It was the Judge's error in determining his bias based on his lack of scienter (and thereby failing to disqualify himself from the litigation) that resulted in the decision in *Liljeberg*. Thus, *Liljeberg* establishes that it is not improper for a presiding judge to self-determine her or his bias. Accordingly, *Liljeberg* supports denial of the Petition because adequate procedural safeguards for review of self-determination are provided for under existing law. *United States v. Ruzicka*, 329 U.S. 287 (1946), cited by Petitioner, is inapposite. In *Ruzicka*, the issue was resolving procedural review between a government agency and the District Courts. *Id.*, at 290.

Moreover, the sound judicial principal of *stare decisis*, that is, to stand on precedent and not to disturb settled points, should lead this Court to deny the Petition. "In light of the 'profound interests in repose' attaching to the

mandate of a court of appeals, the power [to recall the mandate] can be exercised only in extraordinary circumstances. . . ." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998) (*quoting* 16 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3938, p. 712 (2d ed. 1996)). No extraordinary circumstances are presented by this Petition. As such, no compelling reasons exist for the Court to exercise is authority, which is to be used sparingly, as a "last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon*, 523 U.S. at 550. Thus, the Petition should be denied.

III. CONCLUSION

For the foregoing reasons, this Court should deny M2 Software's Petition.

Respectfully submitted,

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